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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1926.

No. [redacted] 131

ANDREW W. MELLON (SUBSTITUTED FOR JAMES C. DAVIS), DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, PETITIONER,

v.

EDWARD GOODYEAR (SUBSTITUTED FOR LOUISA GOODYEAR), AS ADMINISTRATOR OF THE ESTATE OF LEWIS GOODYEAR, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS AND BRIEF IN SUPPORT THEREOF.

M. L. BELL,
New York, New York;
W. F. DICKINSON,
Chicago, Illinois;
T. P. LITTLEPAGE,
Washington, D. C.;
LUTHER BURNS,
Topeka, Kansas;
J. E. DU MARS,
Topeka, Kansas;
W. D. VANCE,
Belleville, Kansas,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

ANDREW W. MELLON (SUBSTITUTED FOR JAMES C. DAVIS), DIRECTOR GENERAL OF RAILROADS AND AGENT OF THE PRESIDENT UNDER TRANSPORTATION ACT, 1920, PETITIONER,

v.

EDWARD GOODYEAR (SUBSTITUTED FOR LOUISA GOODYEAR), AS ADMINISTRATOR OF THE ESTATE OF LEWIS GOODYEAR, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Andrew W. Mellon, as Director General of Railroads and Agent of the President under Transportation Act, 1920, respectfully petitions this Honorable Court to grant its writ of certiorari to the

Supreme Court of the State of Kansas and to remove therefrom to this Court the record in the case in said court entitled "Louisa Goodyear (Edward Goodyear, substituted, R., 137), as administratrix of the estate of Lewis Goodyear, deceased, appellee v. James C. Davis (your petitioner substituted, R., 127), as Director General of Railroads and Agent of the President under Transportation Act, 1920, appellant," No. 26347 on the docket of that court, for a review and determination of said cause by this Court.

The opinion of the Kansas Supreme Court is reported in Goodyear v. Davis (Mellon, substituted), 121 Kan., 392; 247 Pac. Rep., 446.

On July 10, 1926, the Supreme Court of Kansas entered its judgment whereby it affirmed a judgment of the District Court of Republic County, Kansas, in favor of the plaintiff therein as administratrix of the estate of Lewis Goodyear, deceased, and against James C. Davis, as Director General of Railroads and Agent (your petitioner substituted), for the sum of $5,000 (R., 128), which judgment was and is the final judgment of the Supreme Court of Kansas in said cause, and that said Supreme Court of Kansas is the highest court of law and equity in said State in which a decision could be had in said case. This petition for a writ of certiorari is filed within three months of the rendition of said final judgment. Your petitioner presents herewith a certified copy of the entire record in said cause, including the proceedings in the Supreme Court of the State of Kansas and the opinion of said court.

The Matter Involved.

THERE IS BUT ONE QUESTION IN THIS CASE, AND THAT IS WHETHER OR NOT, UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, A SETTLEMENT MADE IN GOOD FAITH DURING THE LIFETIME OF A DECEASED EMPLOYEE AFTER AN INJURY AND PRIOR TO HIS DEATH, IS A BAR TO AN ACTION BY A PERSONAL REPRESENTATIVE FOR THE BENEFIT OF DEPENDENTS FOR THE DEATH IF IT RESULTED FROM THE INJURY; OR, IN OTHER WORDS, DOES THE FEDERAL ACT GIVE THE PERSONAL REPRESENTATIVE OF A DECEASED EMPLOYEE THE RIGHT TO MAINTAIN AN ACTION FOR THE DEATH WHEN THE EMPLOYEE HIMSELF HAS RECOVERED JUDGMENT OR SETTLED IN FULL FOR THE INJURY HE RECEIVED?

The Kansas Supreme Court, in its opinion on this appeal (Goodyear *v.* Davis (petitioner substituted), 121 Kan., 392, 393; 247 Pac., 446), held as follows:

> "The Federal Employers' Liability Act (35 U. S. Stat., ch. 149, as amended by 36 U. S. Stat., ch. 143) creates a right of action in the injured employee for his suffering and loss resulting from the injury and also creates a distinct and independent right of action in the personal representative of the deceased employee in the event death results from the injury, for the benefit of certain designated dependents.
>
> "A settlement made by the injured employee after the injury and prior to his death, for his suffering and loss, is not a bar to the action by the personal representative for the benefit of dependents for the death, if it resulted from the injury."

It is of this construction of the Federal Employers' Liability Act that your petitioner complains.

While this Court has not passed directly upon this question, we contend that it has passed upon it inferentially, and that the holding of the Kansas Supreme Court is contrary to the decisions of this Court in Michigan Central R. Co. v. Vreeland, 227 U. S., 59; 33 Sup. Ct., 192, and St. Louis, etc., R. Co. v. Craft, 237 U. S., 648; 35 Sup. Ct., 704. The decision of the Kansas Supreme Court is also directly contrary to the holding of the Federal Court of Appeals of the Third Circuit in Seaboard Air Line R. Co. v. Oliver, 261 Fed., 1. It is also contrary to the overwhelming weight of judicial authority, as will be shown by the brief hereto attached, and if upheld by this Court will make settlements impossible in serious personal injury cases arising under the Federal Employers' Liability Act, thus affecting vitally the management of 250,000 miles of railroad in the United States, as well as several hundred thousand railroad employees, any of whom might receive injuries in interstate commerce and be desirous of making settlement without litigation.

This action was brought in the State court for damages under the Federal Employers' Liability Act of April 22, 1908, and 1910 Amendment thereto, ch. 149, 35 Stat., 65; ch. 143, 36 Stat., 291. Plaintiff's intestate, Lewis Goodyear, was employed by the Director General of Railroads at Belleville, Kansas, as a car inspector and was injured on July 31, 1919, while on the station platform prepared to inspect an incoming inter-

state train, by reason of being struck by a truck which stood on the platform and which did not clear the approaching train. His injuries consisted of two fractured ribs and some bruises on the head, body and knee. He made a full and complete settlement with the Director General of Railroads on March 16, 1920, nearly eight months after the accident, for the sum of $1,135 and payment of some doctor bills, and a complete release was executed by Goodyear for all damages growing out of the accident (R., 13). On May 4, 1920, over nine months after the accident and nearly two months after the settlement, Goodyear died. His widow, Louisa Goodyear, was appointed administratrix and brought suit, the petition alleging that Goodyear's death resulted from the injuries sustained July 31, 1919, as a result of the negligence of the Director General of Railroads (R., 2, 9). An answer was filed consisting of a general denial with plea of contributory negligence, assumption of risk and a plea setting up the general release as a bar to the action (R., 11). A reply was filed, which admitted the signing of the release and receipt of the sum of $1,135, but seeking to avoid the release by a plea that the release was obtained by fraud, or that Goodyear was mentally incapable of executing it, or on account of mutual mistake as to the extent of his injuries (R., 15).

This case was tried twice. The first trial was had in May, 1922, resulting in a verdict and judgment in favor of the defendant, the Director General of Railroads, with special findings of the jury in favor of the defendant (R., 53-56). Instructions were given at the

first trial to the effect that if the release was fairly entered into by Goodyear, without fraud or mistake or mental incapacity, as alleged, the release was a complete bar to an action by the administratrix, and this, we contend, is the law as laid down by this Court and by the Federal courts in construing the Federal Employers' Liability Act. However, the first judgment in defendant's favor was reversed by the Kansas Supreme Court in Goodyear v. Davis, 114 Kan., 557; 220 Pac., 282; 115 Kan., 20; 220 Pac., 1049, under a novel construction of the Federal Employers' Liability Act, to the effect that a settlement made by an injured employee prior to his death was not a bar to an action by a personal representative for the benefit of dependents for the death, if it resulted from the injury, and holding that there was a separate and distinct right of action that remained in existence until the injured employee died, which could not be released during the lifetime of the injured employee.

As there was no final judgment in the case at the first trial, no application for certiorari could be made to this Court. Bruce v. Tobin, 245 U. S., 18; 38 Sup. Ct., 7; Williams v. Southern Pacific Co., 258 U. S., 622; 42 Sup. Ct., 315. Therefore it became necessary to go through another trial.

At the second trial of the case, in November, 1924, the jury returned a general verdict for plaintiff for $5,000, and at the same time made special findings: 1, that the defendant was guilty of no fraud in making the settlement with Goodyear on March 12 and 16, 1920; 2, that Goodyear was mentally capable of trans-

acting business on those dates; 3, that there was no mutual mistake, past or present, as to Goodyear's physical condition prior to and at the time the settlement was agreed upon and completed; 4, that the release was not given under a mistaken belief of Goodyear and a representative of the defendant that the material results of the injuries of July 31, 1919, had disappeared (R., 43). Notwithstanding these special findings of the jury, which, under the law as applied by the Kansas Supreme Court, governed the general verdict and should have precluded the rendering of any judgment in favor of the plaintiff, and notwithstanding a motion was filed by the Director General for judgment upon the findings, the trial court entered judgment for $5,000 upon the general verdict (R., 48). The trial court also gave instructions, which were approved by the Kansas Supreme Court in its opinion, and which virtually compelled the rendition of the verdict and judgment. Instruction No. 8 given by the trial court was as follows (R., 27):

> "You are instructed that the Federal Employers' Liability Act, under which plaintiff's action was brought, creates two separate and distinct rights of action resulting from an injury such as complained of by the plaintiff in this case; one right of action to the injured employee for his suffering and loss resulting from the injury, and one to his personal representative for the benefit of his surviving widow and children, in the event death results from the injury. *And you are instructed that the latter cause of action could not be released by the de-*

ceased Lewis Goodyear by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same. In other words, it did not accrue until his death and hence he could not release it by any act on his part."

This instruction was approved by the Kansas Supreme Court in its opinion upon appeal from the second trial, and your petitioner respectfully insists that such action of the Kansas Supreme Court is an erroneous construction of the Federal Employers' Liability Act, in conflict with the decisions of this Court and of the Federal courts in construing said act. Such a construction invites litigation, permits double recoveries when the act itself says that there shall be but one recovery, impairs the obligation of contracts of settlement, prevents the settlement of disputes and is against public policy, which demands that there shall be an end to litigation.

Reasons for the Allowance of the Writ.

Your petitioner respectfully represents that the writ of certiorari of this Honorable Court should issue because the Supreme Court of Kansas has decided a Federal question of substance erroneously and not in accordance with applicable decisions of this Court and other Federal courts, as follows:

1. In declining to hold that, as a matter of law, the release executed by Lewis Goodyear was a complete

bar to an action by a personal representative after his death.

2. In approving the giving of instruction No. 8 by the trial court as above set out.

3. In permitting a recovery under the Federal Employers' Liability Act notwithstanding a complete settlement was made with the injured employee during his lifetime, thus tending to impair the obligation of the contract of settlement entered into between Goodyear and your petitioner's predecessor, contrary to the provisions of Section 10, Article I, of the Constitution of the United States and contrary to public policy favoring the compromise and settlement of disputes.

4. In permitting a double recovery, to wit, a recovery by Goodyear during his lifetime by virtue of a settlement entered into by him, of which he and his beneficiaries received the benefit during his lifetime, and then permitting a second recovery by the personal representative for the beneficiaries after his death, when the Federal act itself provides, in Section 9 thereof, that "there shall be only one recovery for the same injury."

Your petitioner is advised that said final judgment of the Supreme Court of Kansas is erroneous, and this Honorable Court should require the case to be certified to it for its review and determination for the reasons herein given and the reasons stated in the accompanying brief.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued, under the seal of this Court, directed to the Supreme Court of the State of Kansas, sitting at Topeka, Kansas, commanding the court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of the Supreme Court of Kansas had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Supreme Court of Kansas be reviewed by this Honorable Court, and for such further relief as may seem proper.

M. L. BELL,
New York, New York;
W. F. DICKINSON,
Chicago, Illinois;
T. P. LITTLEPAGE,
Washington, D. C.;
LUTHER BURNS,
Topeka, Kansas;
J. E. DE MARS,
Topeka, Kansas;
W. D. VANCE,
Belleville, Kansas,
Counsel for Petitioner.

STATE OF KANSAS,
County of Shawnee, ss:

Luther Burns, being duly sworn, deposes and says that he is one of the counsel for petitioner; that he has read the foregoing petition and knows the con-

tents thereof; that he has carefully read and studied the duly certified copy of the transcript of record which accompanies the petition herein, being a transcript of the record in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported by said transcript, and he knows of the above proceedings had, and that the matters in said petition herein stated are true to the best of his knowledge and belief.

LUTHER BURNS.

Subscribed and sworn to before me this 20th day of September, A. D. 1926.

[SEAL.]

H. R. HALLECK,
Notary Public.

My commission expires May 11, 1929.

I hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this court.

LUTHER BURNS,
Counsel for Petitioner.

SUPPORTING BRIEF.

The opinion of the court below, the Supreme Court of Kansas, is reported in Goodyear, as administratrix, etc., v. Davis (Mellon substituted), as Director General of Railroads and Agent, 121 Kan., 392; 247 Pac. Rep., 446, and is set out in the record (R., 129).

The date of the judgment sought to be reviewed is July 10, 1926 (R., 128).

This Court has Jurisdiction.

All questions herein arise under a Federal statute—the Federal Employers' Liability Act—and involve a direct construction thereof, being ch. 149, 35 Stat., 65; ch. 143, 36 Stat., 291, and present questions of law under the undisputed facts. This Court has held that such questions are Federal questions of law, of which this Court has jurisdiction, and in numerous cases involving similar questions such jurisdiction has been taken. The jurisdiction of this Court is sustained by the following:

Section 237, Judicial Code as amended by the Act of February 13, 1925.

Subsection (*a*), Section 5, Rule 35 of Revised Rules, effective July 1, 1925.

Chesapeake, etc., R. Co. v. Nixon, 40 Sup. Ct., 495.

Chicago, etc., R. Co. v. Coogan, 46 Sup. Ct., 564.

Statement.

The facts are stated in the petition for the writ under the heading "The Matter Involved" and, briefly repeated, show that Lewis Goodyear was injured July 31, 1919, while employed in interstate commerce as a car inspector, made a complete settlement and executed a full release for a substantial sum March 16, 1920, about eight months after the accident, and died on May 4, 1920, nearly two months after the settlement (R., 8, 13). Notwithstanding the settlement, suit was brought by his widow, as administratrix, claiming that the settlement was vitiated by fraud, mistake or mental incapacity on the part of Goodyear, and in any event that there was a cause of action which remained in the beneficiaries which could not be settled by Goodyear (R., 2, 19). The first trial resulted in a general verdict in favor of the defendant, the Director General of Railroads, which was reversed by the Kansas Supreme Court and the case remanded for another trial (R., 53). At the second trial the jury made specific findings that there was no fraud, mistake or mental incapacity of Goodyear in connection with the settlement (R., 43). Notwithstanding these findings, the jury returned a general verdict in favor of the plaintiff for $5,000 under an instruction of the court to the effect that a separate cause of action existed in favor of a personal representative of the deceased for the benefit of dependents regardless of any settlement made by Goodyear, which he could not release by any act on his part (R., 44, 27).

The question of the proper construction of the Federal Employers' Liability Act was raised throughout the trial by motions for judgment in behalf of the defendant, Director General of Railroads, on the findings of the jury, notwithstanding the general verdict, and because no right of action existed in a personal representative, for the reason that the same had been extinguished by settlement made by Goodyear during his lifetime and a complete release executed for all damages, and these questions were urged both in the trial court and in the Supreme Court of Kansas (R., 45, 46, 52). The Supreme Court of Kansas filed its opinion and order of judgment sustaining the lower court and final judgment of affirmance was entered in the Supreme Court on July 10, 1926 (R., 128).

Assignments of Error.

The Supreme Court of Kansas erred:

1. In refusing to direct the trial court to render judgment in favor of the appellant (your petitioner substituted) upon the special findings of fact made and returned by the jury, notwithstanding the general verdict, as requested by the defendant.

2. In approving the giving by the trial court of instruction No. 8, as follows:

> "You are instructed that the Federal Employers' Liability Act, under which plaintiff's action was brought, creates two separate and distinct rights of action resulting from an injury such as complained of by the plaintiff in this case;

one right of action to the injured employee for his suffering and loss resulting from the injury, and one to his personal representative for the benefit of his surviving widow and children, in the event death results from the injury. And you are instructed that the latter cause of action could not be released by the deceased Lewis Goodyear by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same. In other words, it did not accrue until his death and hence he could not release it by any act on his part."

3. In permitting a recovery under the Federal Employers' Liability Act, notwithstanding a complete settlement was made with the injured employee during his lifetime, thus tending to impair the obligation of the contract of settlement entered into between Goodyear and your petitioner's predecessor, contrary to the provisions of Section 10, Article I, of the Constitution of the United States and contrary to public policy favoring the compromise and settlement of disputes.

4. In permitting a double recovery, to wit, a recovery by Goodyear during his lifetime by virtue of a settlement entered into by him, of which he and his beneficiaries received the benefit during his lifetime, and then permitting a second recovery by the personal representative for the beneficiaries after his death, when the Federal act itself provides, in section 9 thereof, that "there shall be only one recovery for the same injury."

5. In entering judgment affirming the District Court of Republic County, Kansas.

ARGUMENT.

The release executed by the injured employee for all damages was a complete bar to an action for further recovery by a personal representative for subsequent death.

All of the assignments of error will be presented together, because the findings of the jury show conclusively that there was a valid release and extinguishment of any possible cause of action in favor of a personal representative by reason of the settlement made by Goodyear during his lifetime. The issue, thus narrowed, is whether under the Federal Employers' Liability Act, a settlement made in good faith with an injured employee during his lifetime for injuries received in interstate commerce is a bar to an action for further recovery by a personal representative for the benefit of dependents for the subsequent death, if it results from the injury.

As preliminary to the issue as stated, it is proper to say that from the earliest history of Kansas, it has been the law of the State that—

> "When the special finding of facts is inconsistent with the general verdict, the former controls the latter and the court may give judgment accordingly." Section 288, chapter 26, page 171, Compiled Laws of Kansas, 1862.

The identical statute is in effect today, Sec. 60-2918, R. S. 1923.

In Tacha *v.* Chicago, etc., Ry. Co., 97 Kan., 571, 572, the Supreme Court of Kansas said:

> "The special findings acquit the defendant of negligence. Section 294 of the civil code (Laws 1913, ch. 239) provides:
>
> "'When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.'
>
> "So say all the decisions of this court for the last forty years, beginning with Nichols *v.* Weaver, 7 Kan., 373, decided in 1871, down to Martin *v.* City of Columbus, 96 Kan., 803, 153 Pac., 518, decided in 1915."

In Maris *v.* Railway & Light Co., 98 Kan., 205, paragraph 3 of the syllabus is as follows:

> "Where the special findings showing in detail just what occurred contradict and overturn the finding of negligence, they control, and it is proper in such case to set aside the verdict in plaintiff's favor and render judgment for defendant upon the findings."

The following cases hold to the same effect:

Hauck *v.* Mercantile Co. *et al.*, 99 Kan., 790.
Kirk *v.* Stout *et al.*, 105 Kan., 54.
Wall *v.* Construction Company, 108 Kan., 531.
Hanalsery, etc., *v.* Erhardt *et al.*, 110 Kan., 715.
Roome *v.* Petroleum Co., 111 Kan., 633.
Hegarty *v.* National Refining Co., 112 Kan., 151.

In view of the findings of the jury in favor of the appellant, the Supreme Court of Kansas should have directed the trial court to set aside the verdict for $5,000 and enter judgment for the appellant upon the special findings of the jury. It is evident that the general verdict did not represent the will of the jury, but was the result of the instructions given and particularly instruction No. 8, set forth in assignment of error No. 2, which was approved by the Kansas Supreme Court. This instruction No. 8 was clearly erroneous as it is in conflict with the decision of this Court in Michigan Central R. Co. v. Vreeland, 227 U. S., 59; 33 Sup. Ct., 192, in which this Court said, on page 69 of the opinion:

> "The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act."

This Court then said, on page 70 of the opinion:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, Sec. 124; Louisville, E. & St. L. R. R. Co. v. Clark, 152 U. S., 230; Read v. G. E. Ry., L. R., 3 Q. B., 555; Hecht v. O. & M. Ry., 132 Indiana, 507;

> Fowlkes *v.* Nashville & Decatur R. R. Co., 9 Heisk., 829; Littlewood *v.* Mayor, 89 N. Y., 24; Southern Bell Tel. Co. *v.* Cassin, 111 Georgia, 575."

This Court then said, on page 71 of the opinion:

> "The word 'pecuniary' did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."

It thus appears that the Federal Employers' Liability Act is a compensatory statute, not penal, and is subject to the same interpretation as that placed upon the Lord Campbell's Act statutes of the great majority of the States of the Union by the courts of such States.

The case of Hecht *v.* C. & M. Ry., 132 Indiana, 507; 32 N. E., 302, cited in the Vreeland case at page 70, held that a recovery by the injured party in his lifetime would bar an action by his personal representatives after his death. At the conclusion of the opinion, the court said (32 N. E., 305):

> "In this case the injured party at the time of his death could not have maintained an action for the same act or omission had he lived; hence there is no right of action given to his personal representatives by the statute."

The case of Littlewood *v.* Mayor, 89 N. Y., 24, cited in the Vreeland case, held that a suit and judgment in the lifetime of an injured person barred a suit by his administrator after his death.

The case of Southern Bell Tel. Co. *v.* Cassin, 111 Ga., 575; 36 S. E., 881, cited in the Vreeland case, held that a release by the decedent in his lifetime barred an action to recover damages for his wrongful death. It is a most interesting case and goes fully into the reasons upon which the decision is based. It is one of the leading cases upon the construction of Lord Campbell's Act and analyzes the different decisions, both English and American, points out that in two or three instances where the minority rule is adopted the decisions are based upon penal statutes, and reaches the conclusion that there can be no recovery by dependents where there had been a settlement with the decedent during lifetime. The citing of this case in the Vreeland case indicates most strongly that this Court adopted the views expressed therein. Some expressions from the opinion in the Cassin case are as follows:

> "If a release wipes out the wrong done by the defendant, and makes it as though no injury had been suffered, then upon the death of the injured party there would be no cause of action, just as though there had been no injury; and it would not be a question as to the right to maintain two concurrent suits, but as to the right to maintain any suit at all" (36 S. E., 883).
>
> "The various cases under different statutes are supported by different reasons, but, as already stated, they generally agree in holding that there is a single remedy. Tiffany, in his work on Death by Wrongful Act (Section 124), after giving all the acts of the different States, and citing all the cases, including Lord Campbell's Act and decisions thereunder, lays the rule

down as follows: 'If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus, a release by the party injured of his right of action, or a recovery of damages by him for the injury, is a complete defense in the statutory action' " (36 S. E., 886).

"The Fitzgerald case logically leads to the conclusion that the widow is barred by the settlement. To hold otherwise would be to say that the wife could be barred by what her husband said, but not by what he did; that she might be concluded by words, but not by money; that the evidence of her husband, given in the suit for his personal injuries, might be used against her in a suit for his death, but that the more solemn judgment against him would not conclude her. If the wife is in privity with her husband, it is conceded that his settlement will bind her; but, if there is no privity between them as to this class of cases, then, if the husband should sue and fail to recover, the wife, after his death, would not be bound by that judgment. She may bring suit and obtain a verdict notwithstanding the husband failed in his suit. So that not only is a settlement no bar, but neither is a verdict against the husband a bar. This would not only make the statutes penal, but it would not allow the defendant to buy his peace by paying money; nor could he secure peace by making a successful defense immediately after the injury, when the recollection of the witnesses is fresh, when they are all accessible, and when the circumstances of the injury can be most certainly and truthfully portrayed. But, as in this case, five years

after the injury, upon proof, that can oftentimes be only too easily secured, that the old injury has been the cause of the recent death, the defendant is again called into court. What is it to do? How is it to perpetuate its evidence? How is it to know whether the suit is ever to be brought or not? How is it to know whether it is liable or not? It has been acquitted of liability to the husband, but years after it is sought to make it liable to the wife. In many cases it would be perfectly easy for the wife to make out a *prima facie* case—rely, say, upon the presumptions against railroads—and recover against the defendant, who was not at fault, who has been adjudged not to be in fault, but whose witnesses may have died or moved away, or otherwise become inaccessible. These are not improbable results. They are certain to follow if the contention of the defendants in error is sound" (36 S. E., 887).

"The settlement operates as a bar, upon considerations of a public policy encouraging compromises, which would be rendered difficult, if not impossible, under the view contended for by defendants in error. The contention of the defendants in error means that, if a settlement takes place, the defendant may be called upon to pay a second time in case of death. *It means double damages. It means that the statute is to be treated as penal, and not compensatory. It means that we are to lay at the door of our statute the reproach which was so often and so justly uttered against the statutes of some of the other States, as to which it was said that it was actually 'cheaper to kill than to hurt.' With us, hereafter, it would mean the same thing, be-*

cause for the death of the husband there would only be one recovery. For his injury and subsequent death, there could be two recoveries. We have seen that statutes identical with ours in substance, having the same object in view, and intended to give the same rights, have all, or very nearly all, been construed to mean that where the husband was injured, and subsequently settled for the injury, and thereafter died from the effect of the injury, there could be no recovery by his wife for his death. • • • Not only would it be a hardship to require a defendant to pay double damages, but there are questions of public policy which cry out against such a construction—a public policy so pronounced that it would require every reasonable doubt to be resolved in its favor. If the defendant is to pay the injured man full damages, and subsequently is to pay the full value of his life, it becomes manifest that settlements are impossible. It would operate to deprive the injured party 'of the power of settling his claim or realizing anything from it in his lifetime. It would naturally, if not inevitably, prevent settlements and procrastinate litigation until it could be determined whether death would ensue from the injury. There could be little inducement to settle without suit, because whatever might be paid to the injured party would neither bar nor diminish the claim of his widow or children should death ensue.' • • • *Under such a construction the law, by its own act, would encourage litigation, in spite of the maxim that 'it is to the interest of the commonwealth that there should be an end of litigation.'* It would make it impossible to obey the injunction, 'Agree

with thine adversary quickly whilst thou are in the way with him'; for the defendant can properly ask, 'Who is mine adversary?' He might be willing to settle, he may have agreed on terms, and yet he would be compelled to say to a husband and father: 'It is impossible to say whether you will die as a result of these injuries or not, or whether when you die your wife and your children will then be living or not, or whether you will be wifeless and childless.

"'She may consent to the settlement, but she may also die, and you may marry again. Or the wife may die and leave you children. It is impossible to settle with them, because they are minors, and, even if that were legally possible, there may be after-born children; and all of these uncertainties must be considered in our negotiations.' *Surely the law does not intend that any case shall be so inchoate that the person liable does not know to whom he may be ultimately liable, and cannot adjust and settle, even when he admits liability and is willing to pay*" (36 S. E., 889). (Italics ours.)

By citing this case, on page 70 of the opinion in the Vreeland case, this Court undoubtedly intended that it should govern the construction to be placed upon the Federal Employers' Liability Act.

In Edwards v. Chemical Co., 170 N. C., 551; 87 S. E., 635, it was held that a judgment obtained and satisfied during the lifetime of an injured party was a bar to the maintenance of an action for damages on account of the death resulting from such injuries. The court said:

"The question presented in the record has been much considered by the courts, and it has been very generally held—a position in which we fully concur—that the statute conferring a right of action for wrongfully causing the death of another, usually to be prosecuted by the personal representative, *does not, and was not intended to confer such right when the intestate, the injured party, had been compensated for the injury during his life and had received such compensation in full adjustment of his claim.* The legislation on the subject in this country is, to a large extent, modeled upon an English statute, commonly known as Lord Campbell's Act, St. 9 & 10 Vict. c. 93. Our own law (Revisal, Secs. 59 and 60) being substantially a reproduction of the English statute, and the construction put upon the law in England was that the action would not lie if the injured party had, during his life, received satisfaction for the wrong; these courts being of opinion that it was the purpose and meaning of the statute to deprive the wrongdoer of the protection oftentimes afforded by reason of the common-law principle that actions of this character died with the person. Read *vs.* Great Eastern Ry., Law Reports, 3 C. Q. B. (1867-68), p. 555. In that action, it was shown that the injured party, deceased, had accepted a sum of money in full satisfaction for the wrong, and the plea in bar was held a good defense. Blackburn, Judge, delivering the principal opinion, said, in part:

"'Before that statute (Lord Campbell's Act) the person who received a personal injury and survived its consequences could bring an action and recover damages for the injury, but if he

died from its effects, then no action could be brought. To meet this state of the law, the Act of St. 9 and 10 Vic. was passed,' etc."

"And Lush, Judge, concurring, said in part:

"'I am of the same opinion. The intention of the statute is not to make the wrongdoer pay damages twice for the same wrongful act, but to enable the representatives of the person injured to recover in a case where the maxim, "*Actio personalis moritur cum persona*, would have applied." It only points to a case where the party injured has not recovered compensation against the wrongdoer.'

"This construction of the law has been very generally adopted by the courts of this country, whether the statutory action is considered a new right or a continuation of the old, and there is very little to be added to the cogent reasoning which they have presented in support of the position. Littlewood *vs.* Mayor, 89 N. Y., 24; 42 Am. Rep., 271; Telephone Co. *vs.* Cassin, 111 Ga., 575; 36 S. E., 881; 50 L. R. A., 694; Thompson *vs.* Railway, 97 Tex., 580; 80 S. W., 980; 1 Ann. Cas., 231; Price *vs.* Railroad, 33 S. C., 556; 12 S. E., 413; 26 Am. St. Rep., 700; Hecht *vs.* Railway, 132 Ind., 507; 32 N. E., 302; Mooney *vs.* Chicago, 239 Ill., 414; 88 N. E., 194. And cases in Supreme Court of the United States and text-books of approved excellence recognize and approve the principle. Michigan Cent. Ry. *vs.* Vreeland, 227 U. S., 59-70; 33 Sup. Ct., 192; 57 L. Ed., 417; Ann. Cas. 1914C, 176; Tiffany on Death by Wrongful Act (2d ed.), Sec. 124; 3 Elliott on Railways (2d ed.), Sec. 1376; 8 A. & E. Ency., p. 870; 13 Cyc., p. 325.

"In the citation to Tiffany, the author says:

"'If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him in damages for the personal injury, this will operate equally as a bar in an action by his personal representative for his death. Thus, a release by the injured party of his right of action, or a recovery of damages by him for the injury, is a complete defense in the statutory action.'

"In Vreeland's case, Associate Justice Lurton, delivering the opinion, said:

"'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent, immediately before his death to have maintained an action for his wrongful injury.'"

In Louisville R. Co. v. Raymond's admr., 135 Ky., 738; 123 S. W., 281, the court held that it was error to sustain a demurrer to that part of the answer pleading a settlement, for the reason that settlement or recovery by the decedent during his lifetime was a bar to an action by the personal representative for the death, citing the Hecht, Littlewood and Cassin cases, referred to in the Vreeland case, 227 U. S., 70. The court added: "The authorities on the subject are consistent and uniform. 13 Cyc., 325."

The Raymond case was followed in Perry's adm'r v. L. & N. R. Co., 199 Ky., 396; 251 S. W., 202, in which it was held:

> "The personal representative acts for and on behalf of and in the stead of a deceased person only, and, if the deceased would have had no cause of action had she lived, none would pass to an administrator to recover damages for her death."

In State v. United Rys., 121 Md., 457; 88 Atl., 229, it was held that under a Lord Campbell Act statute, where an injured person released the defendant from all claims on account of the injury during his lifetime, such release was a bar to a subsequent action for his death resulting from the injury. The decision was based upon the same authorities as were quoted in the Vreeland case.

In Strode v. Transit Co., 197 Mo., 616; 95 S. W., 851, it was held that a settlement made with an injured person during his lifetime was a complete bar to an action for wrongful death, and, on page 856, the court said:

> "Whether the right of action is a transmitted right or an original right; whether it be created by a survival statute or by a statute creating an independent right, the general concensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts no further right of action existed."

The above was quoted with approval by the Kansas Supreme Court in Sewell v. Ry. Co., 78 Kan., 1, 14.

Even in Pennsylvania, where there is a peculiar statute providing that no action for personal injuries by negligence or default shall abate at plaintiff's death, but shall survive to his personal representatives, and that when an injured person did not sue during his lifetime his widow or personal representative may sue, it was held, in Hill *v.* Penn. R. Co., 178 Pa., 223; 35 Atl., 997, that where a settlement was made with the injured person and a release taken such release was binding. This was based upon the Read case, 3 Q. B., 555, cited in the Vreeland case.

It is not necessary to multiply these authorities. The general rule is stated in 17 *Corpus Juris*, 1246, as follows:

> "Whether the right of action is a transmitted right or an original right, and whether it is created by a survival statute or by a statute creating an independent right, the general concensus of opinion is that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased has received satisfaction in his lifetime, either by settlement and adjustment, or by adjudication in the courts, it is a good defense to the statutory action brought after his death."

Heretofore the Kansas decisions have been strongly in line with the majority rule, beginning with 18 Kan., 46, down to 93 Kan., 769. The uniform interpretation of such acts as the Lord Campbell Act, the distinguishing features of which this Court says are identical with the Federal Employers' Liability Act, was recognized

by the Kansas Supreme Court in Berner *v.* Merc. Co., 93 Kan., 769, 770, where it is said:

> "By the great weight of authority an action can not be maintained under such a statute where the injured person in his lifetime had made a settlement and released his claim for the loss occasioned to him. Such is the law in this state. The conflict in the cases is noted, and the reasons for the rule stated, in Sewall *vs.* Railway Co., 78 Kan., 1, 11 16; 96 Pac., 1007. See, also, note, 27 L. R. A., n. s., 176; note, 1 Ann Cas., 232; 1 C. J., 526; Perry *vs.* P., B. and W. R. R., 24 Del., 389; 77 Atl., 725; Mooney *vs.* City of Chicago, 239 Ill., 414; 88 N. E., 194; Melitch *vs.* United Rys. & E. Co., 121 Md., 457, 88 Atl., 229."

In Frese *v.* Chicago, B. & Q. R. Co., 44 Sup. Ct., 2, it is held:

> "If the engineer could not have recovered for an injury his administratrix cannot recover for his death. Michigan Central R. R. Co. *vs.* Vreeland, 227 U. S., 59, 70."

The reference to page 70 of 227 U. S. is very significant, for there is where appears the statement that "the foundation of the right of action is the original wrongful injury to the decedent" and that the new action "is a right dependent upon the existence of a right in the decedent immediately upon his death to have maintained an action for his wrongful injury," citing the long list of cases holding that there can be no recovery by dependents *where there had been a settlement or recovery by decedent during his lifetime.*

So in the case now before the Court, if Goodyear could not have recovered for injuries sustained because he had in good faith accepted a sum in full and complete settlement therefor, neither can his administratrix recover for his death. The right of an administratrix to recover is contingent upon the existence of a right of an injured employee to sue for such injuries. When he has extinguished that right by settlement or by suit, then that tangible substance which was created by the injury, having been completely destroyed by the act of the injured in making settlement or obtaining judgment and no longer existent, nothing remains for his personal representative upon which to base an action. This Court stated in American R. Co. v. Didricksen, 227 U. S., 145; 33 Sup. Ct., 224, 225:

> "The cause of action which was created in behalf of the injured employee did not survive his death, nor pass to his representatives. But the act, in case of the death of such an employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute."

This new and distinct right of action for the benefit of different relatives does not come into existence if the injury upon which the new right is based is extinguished by the injured employee, either by settlement or by suit. In Centofanti v. Pennsylvania R. Co., 90 Atl., 558; Western U. T. Co. v. Preston, 254 Fed., 229, it is said that "the tort which produces death and

not the death caused by the tort" is the basis of the action.

In St. Louis, etc., R. Co. v. Craft, 237 U. S., 648, 659; 35 Sup. Ct., 704, this Court declined to pass upon the question of what would be the effect had there been a recovery by the decedent during his lifetime, for the reason that this question was not involved in the litigation then before it. However, in passing and reserving the question of the application of the concluding clause of Section 9 of the act (1910 Amendment), to wit, "But in such cases there shall be only one recovery for the same injury," it is quite significant that this Court referred to page 70 of the opinion in the Vreeland case in 227 U. S., where it is expressly stated:

> "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury."

This reference to the Vreeland case must mean that the rule laid down in the cases cited in that paragraph governs such a situation and these cases all hold that a settlement made or recovery obtained by an injured person is an absolute bar to a subsequent action under the statute for his death.

This is the conclusion reached in 17 Corpus Juris, 1250, where the text based principally upon the Vreeland and Craft cases, is given as follows:

"But regardless of whether the statutory cause of action for death is regarded as strictly a new and independent cause of action, or as a transmitted, substituted, or survival right, it is almost everywhere held that a recovery by decedent for the personal injury to him is an absolute bar to the subsequent maintenance of an action under the statute for his death, and a final valid judgment on the merits denying a recovery has a like effect. *Doubtless this is the rule under the Federal Employers' Liability Act which expressly provides that there shall be but one recovery for the same injury.*" (Italics ours.)

The precise issue presented in this case was decided by the Court of Appeals of the Third Circuit in Seaboard Air Line v. Oliver, 261 Fed., 1. This is the only Federal case which we have been able to find in the books which decides the exact question under discussion. The decision of the Kansas Supreme Court is in direct conflict therewith. The Oliver case involves the interpretation of the Federal Employers' Liability Act where an injured employee, engaged in interstate commerce, brought suit and recovered for injuries and subsequently dying, his personal representative brought suit under the survival provision of the Federal act. In its opinion the court said:

"So far as we are advised, the *question whether the statute mentioned gives a deceased employee's personal representative the right to maintain an action when the employee himself has recovered for the injury he suffered has not heretofore been ruled on.* It is not open to ques-

tion that the statute provides for two distinct rights of action. One in the injured person for his personal loss and suffering, where the injuries are not immediately fatal; and the other in his personal representative for the pecuniary loss sustained by designated relatives, where the injuries immediately or ultimately result in death, the damages recoverable in the one case not being the same as those recoverable in the other. Michigan Central R. R. vs. Vreeland, 227 U. S., 59; 33 Sup. Ct., 192; 57 L. Ed., 417, Ann. Cas. 1914C, 176; St. Louis & Iron Mountain Ry. vs. Craft, 237 U. S., 648, 35 Sup. Ct., 704; 59 L. Ed., 1160.

"Until the act of 1908 (35 Stat., 65, c. 149) was amended by the act of April 5, 1910 (36 Stat., 291, c. 143), the right of action given to the injured person was extinguished by his death. The act of 1908, with qualifications which need not now be mentioned, made a common carrier by the railroad, while engaging in interstate commerce, 'liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of' designated relatives. The following is the section added by the amendment of 1910:

"'Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents; and, if none, then of the next kin dependent upon such employee, but in such

cases *there shall be only one recovery for the same injury.*'

"The amendment does no more than provide for the survival of the employee's right of action *if it remained in existence up to the time of his death*, and that 'in such cases'—that is, cases of survival of the employee's right of action—there shall be only one recovery for the same injury. *If the employee had no right of action immediately before he died, his personal representative has no right of action other than such as was given by the act before it was amended. The section added by the amendment of* 1910 *is not applicable to such a case.*

"The first section of the act makes the carrier liable in damages to the injured employee, 'or, in case of the death of such employee, to his or her personal representative, for the benefit,' etc. The two distinct rights of action are given in the alternative or disjunctively. The language used indicates the absence of an intention to allow recoveries for the same wrong by both the injured employee and, in case of his death, by his personal representative; only one recovery being allowed when the injured employee dies without having enforced the right of action given to him. It seems to be a fair inference from that language that the right of action given to the injured employee's personal representative was intended to be unenforceable after the enforcement and satisfaction of the one given to the employee himself. From the fact that one wrong gives rise to two or more rights of action, it does not follow that there can be more than one recovery based on that wrong. An intention to permit more than one

> recovery for an injury to an employee for which a statute gives a right of action to the employee, or, in case of his death, to his personal representative, is not to be inferred, in the absence of language evidencing such intention, where the wrong upon which the rights of action given are based is a tort, the inception and continued existence of which is dependent upon conduct of the employee at the time of, or subsequent to, the injury."

Then, on page 4, the court continues:

> "Nothing in the act now under consideration indicates an intention to make the injured employee's right or power to deal with his employer with reference to the wrong for which the latter is made liable any different from that usually possessed by the victim of a tort. Ordinary incidents of a right to recover damages for a tort are the powers of enforcing the tortfeasor's liability therefore by suit and of discharging all liability incurred for a consideration received. Can it properly be said that the act has the effect of depriving an injured employee of the benefit of getting what his employer may be willing to pay to obtain a discharge of all liability incurred? We think not. *So long as the employee lives, he alone can sue for the tort. The act does not indicate a purpose to make the amount he may recover any less than it might have been if, in case of his death, no right of action had been given to his personal representative. The right of action conferred on him is not so restricted as to prevent his enforcing all liability the employer is subjected to for the wrong done to the employee.*

So long as the injured employee survives, there is no limitation on his right to recover all that, in such a situation, is recoverable from the employer for the one tort committed. Language used in the first section of the act fairly negatives the conclusion that a deceased employee's personal representative is given the right to maintain an action on the tort against the deceased for which the latter sued and recovered during life. *If, during the life of the injured employee, his employer's liability for the tort is extinguished by any occurrence ordinarily having that effect, the employer's personal representative has no right of action for the injury, as the single cause of action upon which a suit by him must be based has ceased to exist.*

The Federal Employers' Liability Act differs from Lord Campbell's Act, and other similar statutes, in that the former does not in terms make the personal representative's right to maintain an action dependent upon the existence of a right of action in the decedent immediately before he died. The defendant in error's lack of right to maintain his suit in such a situation as the one under consideration is due, not to the decedent's lack, immediately prior to his death, of an enforceable right of action for the injury he sustained, *but to the fact that the cause of action counted on has been extinguished by payment of the judgment* recovered by the decedent for the wrong he suffered." (Italics ours.)

The Oliver case arose from a situation similar to that presented here. There was an injury under the Federal act. A suit was brought and a judgment ob-

tained by the injured, whereas we have a settlement and a release—a contract. A judgment paid and a contract performed are entitled to equal sanctity. They are of equal force in law. If the judgment in the Oliver case extinguished all causes of action under the act, and unquestionably it did so, as held in the opinion, so the contract of settlement and the release in the present case, with and by the injured employee, Goodyear, extinguished all rights of action under the act. The Oliver case is directly in point and is a Federal decision by the United States Circuit Court of Appeals that is entitled to great weight, as it was based upon the Vreeland and Craft cases, the court expressly stating that the question was one of first instance, as it had not yet been ruled upon. It recognized the two distinct rights of action under the Employers' Liability Act, and the effect of the 1910 amendment. It is clear and beyond cavil that where under the act a right of action is given the injured employee and he makes settlement, any cause of action is extinguished that might otherwise go to a personal representative. The Federal act is not entitled to receive a liberal and expensive application, as the court so held in Winfree v. Ry. Co., 173 Fed., 65, 66:

> "The statute in question, while it is remedial in the sense that it affects the remedy in accident cases, is not of the nature of those remedial statutes which have received a liberal and expansive application at the hands of the courts, such as statutes intended to remedy a mischief, to promote public justice, to correct innocent mistakes, to cure irregularities in ju-

dicial proceedings, or to give effect to the acts and contract of individuals according to the intent thereof. It is a statute which permits recovery, in cases where recovery could not be had before, and takes from the defendant defenses which formerly were available, defenses which in this instance existed at the time when the contract of service was entered into and at the time when the accident occurred." (Affirmed 227 U. S., 296.)

In 39 A. L. R., 579, there is an elaborate note upon the question as to whether a release by or judgment in favor of an injured person operates as a bar to an action for his death, showing that the overwhelming weight of authority is in the affirmative and that the decision of the Kansas Supreme Court in the case at bar is contrary to the almost universal construction placed by the courts upon compensatory statutes. This annotation starts out by saying:

"The more general view is that statutes of the nature of Lord Campbell's act are not survival statutes, but create a new cause of action distinct from any the deceased might have had, had he survived. 8 R. C. L., 725.

"By the great weight of authority, however, where the statute in effect gives a remedy to recover damages where the death of a person is caused by the negligent or wrongful act of another, such remedy depends upon the existence in the decedent, at the time of death, of a right of action to recover damages for such injury; hence if by a recovery of a judgment for damages due to the injury, or by a settlement with the wrongdoer, the injured person releases his

> cause of action, such release, in the absence of fraud or mistake, will preclude a recovery by his personal representative of damages based upon the same negligent or wrongful act."

Then follows the list of Federal and State authorities, most of which have been referred to herein. For ready reference, this list is as follows:

United States.—Seaboard Air Line R. Co. *v.* Oliver (1919), 171 C. C. A., 597; 261 Fed. 1 (Federal Employers' Liability Act); Lindsay *v.* Chicago, B. & Q. R. Co. (1915), 141 C. C. A., 131; 226 Fed., 23. See Michigan C. R. Co. *v.* Vreeland (1912), 227 U. S., 59; 57 L. Ed., 417; 33 Sup. Ct., 192; Ann. Cas. 1914C, 176 (comparing Lord Campbell's Act; Federal Employers' Liability Act).

Delaware.—Perry *v.* Philadelphia, B. & W. R. Co. (1910), 1 Boyce, 399; 77 Atl., 725.

Georgia.—Southern Bell Teleph. & Teleg. Co. *v.* Cassin (1900), 111 Ga., 575; 50 L. R. A., 694; 36 S. E., 881 (similar to Lord Campbell's Act); Morton *v.* Georgia R. & E. Co. (1916), 145 Ga., 516; 89 S. E., 488 (similar to Lord Campbell's Act).

Illinois.—Holton *v.* Daly (1882), 106 Ill., 136 (similar to Lord Campbell's Act); Mooney *v.* Chicago (1909), 239 Ill., 414; 88 N. E., 194 (similar to Lord Campbell's Act); Bruns *v.* Welte (1905), 126 Ill. App., 541 (similar to Lord Campbell's Act).

Indiana.—Hecht *v.* Ohio & M. R. Co. (1892), 132 Ind., 507; 32 N. E., 302 (similar to Lord Campbell's Act); Golding *v.* Knox (1914), 56 Ind. App., 149; 104

N. E., 978; Haskell & B. Car. Co. *v.* Logermann (1919), 71 Ind. App., 69; 123 N. E., 818.

Kansas.—Sewell *v.* Atchison, T. & S. F. R. Co. (1908), 78 Kan. 1; 96 Pac., 1007; Berner *v.* Whittelsey Mercantile Co. (1915), 93 Kan., 769; 145 Pac., 567; Ann. Cas. 1916D, 350 (similar to Lord Campbell's Act).

Kentucky.—Louisville R. Co. *v.* Raymond (Louisville R. Co. *v.* Taylor) (1909), 135 Ky., 738; 27 L. R. A. (N. S.), 176; 123 S. W., 281; Perry *v.* Louisville & N. R. Co., 199 Ky., 396; 251 S. W., 202 (similar to Lord Campbell's Act).

Maryland.—State use of Melitch *v.* United R. & E. Co. (1913), 121 Md., 457; L. R. A. 1915E, 1163; 88 Atl., 229 (similar to Lord Campbell's Act).

Michigan.—Sweetland *v.* Chicago & G. T. R. Co. (1878), 117 Mich., 329; 43 L. R. A., 568; 75 N. W., 1066; 4 Am. Neg. Rep., 648 (similar to Lord Campbell's Act); Mehegan *v.* Boyne City, G. & A. R. Co. (1913), 178 Mich., 694; L. R. A., 1915E, 1170; 141 N. W., 905; 148 N. W., 173 (similar to Lord Campbell's Act); Lincoln *v.* Detroit & M. R. Co. (1914), 179 Mich., 189; 51 L. R. A. (N. S.), 710; 146 N. W., 405 (similar to Lord Campbell's Act).

Mississippi.—Hamel *v.* Southern R. Co. (1915), 108 Miss., 195; 66 So., 809 (similar to Lord Campbell's Act); Harris *v.* Illinois C. R. Co. (1916), 111 Miss., 623; 71 So., 878 (similar to Lord Campbell's Act).

Missouri.—Strode *v.* St. Louis Transit Co. (1906), 197 Mo., 616; 95 S. W., 851; 7 Ann. Cas., 1084 (referred to as transmitted action); Schmelzer *v.* Central Furniture Co. (1913), 252 Mo., 12; 158 S. W., 353.

New Hampshire.—Cogswell *v.* Boston & M. R. Co. (1917), 78 N. H., 379; 101 Atl., 145 (survival action).

New York.—Littlewood *v.* New York (1882), 89 N. Y., 24; 42 Am. Rep., 271 (similar to Lord Campbell's Act); McKahey *v.* Nassau Electric R. Co. (1900), 51 App. Div., 281; 64 N. Y. Supp., 965, affirmed in (1901), 166 N. Y., 617; 59 N. E., 1126 (similar to Lord Campbell's Act); Casey *v.* Auburn Teleph. Co. (1913), 155 App. Div., 66; 139 N. Y. Supp., 579; Dibble *v.* New York & E. R. Co. (1857), 25 Barb., 183 (similar to Lord Campbell's Act).

North Carolina.—Edwards *v.* Interstate Chemical Co., 170 N. C., 551; 87 S. E., 635 (similar to Lord Campbell's Act).

Ohio.—Solar Ref. Co. *v.* Elliott (1898), 15 Ohio C. C., 581; 8 Ohio C. D., 283 (similar to Lord Campbell's Act).

Pennsylvania.—Hill *v.* Pennsylvania R. Co. (1896), 178 Pa., 223; 35 L. R. A., 196; 56 Am. St. Rep., 754; 35 Atl. 997 (similar to Lord Campbell's Act).

South Carolina.—Price *v.* Richmond & D. R. Co. (1890) 33 S. C., 556; 26 Am. St. Rep., 700; 12 S. E., 413 (similar to Lord Campbell's Act); Rish *v.* Seaboard Air Line R. Co. (1916), 106 S. C., 147; 90 S. E., 704 (similar to Lord Campbell's Act).

Tennessee.—Brown *v.* Chattanooga Electric R. Co. (1898), 101 Tenn., 252; 70 Am. St. Rep., 666; 47 S. W., 415 (similar to Lord Campbell's Act).

Texas.—Thompson *v.* Ft. Worth & R. G. R. Co. (1899), 97 Tex., 590; 80 S. W., 990; 1 Ann. Cas., 231 (similar to Lord Campbell's Act); St. Louis Southwestern R. Co. *v.* Hengst (1904), 36 Tex. Civ. App., 217;

81 S. W., 832 (similar to Lord Campbell's Act); Blount *v.* Gulf, C. & S. F. R. Co. (1904), — Tex. Civ. App., —; 82 S. W., 305 (similar to Lord Campbell's Act).

Vermont.—Legg *v.* Britton (1892), 64 Vt., 652, 24 Atl., 1016 (similar to Lord Campbell's Act).

Washington.—Brodie *v.* Washington Water Power Co. (1916), 92 Wash., 574; 159 Pac., 791.

Wisconsin.—Brown *v.* Chicago & N. W. R. Co. (1899), 102 Wis., 150; 44 L. R. A., 579; 77 N. W., 748; 78 N. W., 771; 5 Am. Neg. Rep., 255 (similar to Lord Campbell's Act).

England.—Read *v.* Great Eastern R. Co. (1868), L. R. 3, Q. B. 555 (Lord Campbell's Act); Griffiths *v.* Dudley (1882), L. R. 9, Q. B. Div. 357 (Lord Campbell's Act).

Canada.—British Columbia Electric Co. *v.* Turner (1914), 49 Can. S. C., 470; 18 D. L. R., 430; Ann. Cas. 1914D; 490 (similar to Lord Campbell's Act).

This settled interpretation by the courts of 21 States (including previous decisions in Kansas), as well as England, where the original Lord Campbell's Act originated, and by the courts of Canada, as well as the Federal Court of Appeals in the Oliver case, should be accepted as the settled law upon the subject in the interest of uniformity of judicial decision. The Oliver case directly involves the Federal Employers' Liability Act, passes upon the exact question at issue in the case at bar, and should be followed.

Any other interpretation of the Federal Employers' Liability Act would make a compensatory statute penal, encourage litigation, permit a double recovery when

the statute itself says there shall be but one recovery, and render it impossible to make a valid settlement in claims of this character during the lifetime of the injured person. Surely reason, justice, public policy and overwhelming weight of judicial decision, protest against such a construction.

Instruction No. 8 (Assignment of Error No. 2) is contrary to public policy favoring compromise and settlement of disputes and contrary to Section 10, Article 1 of the Constitution, as tending to impair the contract of settlement.

The courts have held repeatedly that the law favors the compromise and settlement of disputes. This rule of public policy is well stated in 12 *Corpus Juris*, at page 336, as follows:

> "The law favors the compromise and settlement of disputed claims and will sustain such settlements if fairly made, because it is to the interest of the state that there should be an end to litigation."

The text is supported by several columns of authorities.

Instruction No. 8 states that the Federal act creates two separate and distinct rights of action resulting from an injury, one in the injured employee for his suffering and loss, and one to his personal representative for the benefit of his surviving widow and children in the event death results from the injury, and then concludes with the following startling declaration of law:

> "And you are instructed that the latter cause of action could not be released by the deceased, Lewis Goodyear, by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same. In other words, it did not accrue until his death and hence he could not release it by any act on his part."

If this instruction places a correct interpretation upon the Federal act, it presents a situation where no settlement can be made during the lifetime of an employee injured in interstate commerce. As no administrator or personal representative could be appointed until the death of the injured employee, there would be no possible way to make a valid settlement. There would be no inducement to attempt settlement and pay a large sum of money even if both parties were willing to settle upon any terms and even though the settlement would be of great benefit to the injured employee as well as his dependents while he lived, so long as there was a prospect of another suit upon his death in favor of a personal representative for another unlimited sum at the whim of a jury for alleged pecuniary loss to dependents. This is certainly against public policy favoring compromise and settlement and the avoiding of litigation.

Uniformity of decision is also sought as a matter of public policy. The above construction given to the Federal act by the trial court and affirmed by the Kansas Supreme Court presents a situation where there is one rule in Kansas under the State death statute

(Berner v. Merc. Co., 93 Kan., 769), and another and different rule under the Federal act, which the higher Federal courts have pointed out is modeled upon the same original Lord Campbell's Act. The same rule should be applied to both, as the statutes are both compensatory in their application. When a rule of law has been established for years, it is most unfortunate to have a decision made that changes the construction established by a long line of decisions.

The uncertainty of the law has been deplored by the layman for many years. When an unbroken line of decisions for forty-five years is swept away and an exception made in legal interpretation that will permit double recovery where not permitted before, in the event there should happen to be one interstate car in a train upon which a serious injury occurs, making the Federal act applicable, and only a single recovery or a different method of recovery where no interstate commerce is involved, it is beyond the grasp of the ordinary citizen and makes him wonder.

If the interpretation placed upon the Federal Employers' Liability Act by the Kansas Supreme Court is not reversed by this Court, no employer within the Federal act could settle with his injured employee and rest in anywise secure on such settlement. Medical experts of renown disagree, but it is not generally the prominent physicians who are called in personal injury cases. We cannot conceive a case in which a personal representative of a deceased railroad employee could or would not have medical testimony to the effect that a certain person in his or their opinion

died as a result of injuries which he had sustained—one, two, five, ten, fifteen or twenty years before. Indeed, the court instructed the jury in this case as the law (instruction No. 41) (R., 37) that if the jury should find from the evidence that Goodyear was injured by the negligent act of the defendant "and which act accelerated a diseased condition existing at the time of the injury, thereby hastening and prematurely causing death of said Lewis Goodyear, that the defendant would be liable for the death of said Goodyear, even though the disease which he had at the time of his injury might have resulted in death at a later time without having received said injury." In substance the instruction probably declared the law as existing in most States. The injury itself was not sufficient to cause death, but coupled with other existing infirmities might have hastened the death. So declares the law. But no State had ever held that an injured person does not hold within his power the right to settle with a tort feasor for the wrongful injury. Neither did Congress intend in the employers' liability act to write any such startling declaration of law that an injured employee could not settle and extinguish absolutely all rights of action in his favor and in favor of all other persons however dependent upon him and however aggravated the negligence may have been which caused the injury. Generally fair sums are paid in settlement; say for the loss of a leg judgments of from ten to twenty thousand dollars, and sometimes larger, have been upheld. Suppose an employee is injured in circumstances which indicate negligence on

the part of the employer. A settlement is made in good faith for $20,000. The injured employee is given a job as tower operator, which pays him as much or more than he earned in his employment when injured. He survives ten years. An infection sets up in the stump of the leg and he dies as a result. Of course there would be no infection in the stump of his leg if his leg had not been off, so unquestionably his end is brought about prematurely through the *injury* which he originally sustained. It would not require medical science to say that he died as a result of the injury, but at the trial cumulative numbers of physicians would testify that in their opinion the death of the employee was caused by the injury which he sustained many years before, resulting in the loss of his leg and in their opinion his subsequent death. Under instruction No. 8 given by the court a widow and flock of children born subsequent to the loss of the leg, all dependent upon this employee, could bring suit through a personal representative and obtain a judgment for $20,000 more.

Under the rule as given by instruction No. 8 in this case, if a wife should be the only dependent and should join in a settlement made by the employer and by herself and husband in the best of faith for the payment of an adequate sum of money, such a sum as is usually paid where an employee suffers the loss of a leg, and the employee after ten years died in the circumstances above related, since the widow, the only beneficiary, did not join in the settlement as a *personal representatives*, she, under the theory pronounced by the

court in instruction No. 8, would have herself appointed administratrix and would recover as much as was paid in the first instance voluntarily by the railway company.

The chaos and confusion spread broadcast over 250,000 miles of railroad in the United States by a decision of this character is hard to visualize.

The Release.

The release attached to the answer (R., 13) and which was upheld by the jury as a valid contract of release, is broad enough to cover everything in the way of damages on account of the claimed injuries as well as all causes of action growing out of the accident. The parties settled not only the amount but the cause of action itself, and all questions of interstate commerce, assumption of risk, negligence or otherwise. Goodyear was placed in exactly the same position he would have occupied if uninjured. The freedom of contract implies all of this, and to say that a man may recover enough to make him whole throughout his expectancy of life and give his family the benefit of it until he dies, and then, that the family may recover more through an action by a personal representative, would be an arbitrary, capricious and unconstitutional exaction. The effect of instruction No. 8 was to overturn the contract of release found by the jury to have been fairly and honestly made. Shall it be that citizens can no longer settle their differences only so long as the contracting parties live, then to have them overturned and ignored by surviving widows and children?

Has Congress written such a law that an employer may no longer deal finally with his employee in case of injury? Shall the employer refuse settlement to his injured employees and be made to pay them at the conclusion of a lengthy, expensive and disagreeable lawsuit, with full knowledge that after death of the employee, the employer will again be met with a demand for more money and will be confronted with the subtle suggestion that in Goodyear *v.* Davis it was declared as the law of the land that he should again have to open the purse strings and pay? We believe Congress contemplated no such interpretation of its act, nor do the decisions of the courts justify such holding here.

Under such a construction injuries occurring in interstate commerce under a statute that is purely compensatory would be incapable of compromise. This Court holds that binding contracts of release can be made, even in advance of an injury.

In Northern Pac. *v.* Adams, 192 U. S., 440, 453, it was held that the conditions of a free pass were valid and binding and formed "a contract which neither party was bound to enter into and yet one which each was at liberty to make and no public policy was violated thereby." In the first headnote it is said:

> "And if the passenger is injured or killed while riding on such a pass gratuitously given, which he has accepted with knowledge of the conditions therein, the company is not liable therefor either to him or to his heirs, in the absence of willful or wanton negligence."

In K. C. S. R. Co. *v.* Van Zant, 43 Sup. Ct., 176, the second headnote is as follows:

> "An interstate pass issued to passenger who was permitted to receive it under the Hepburn Act, can provide that the carrier shall not be liable for injuries caused by any accident."

Certainly the law does not contemplate two recoveries of damages under a statute that is purely compensatory. It seems equally clear that a fair contract of release made with an injured employee during his lifetime extinguishes any cause of action that otherwise might accrue to a personal representative, upon his death, under the Federal Employers' Liability Act.

The Supreme Court of Kansas was clearly wrong in the determination of a Federal question arising under the Federal Employers Liability Act. A writ of certiorari should be granted to correct its judgment.

Respectfully submitted,

M. L. BELL,
New York, New York;
W. F. DICKINSON,
Chicago, Illinois;
T. P. LITTLEPAGE,
Washington, D. C.;
LUTHER BURNS,
Topeka, Kansas;
J. E. DeMARS,
Topeka, Kansas;
W. D. VANCE,
Belleville, Kansas,
Counsel for Petitioner.